

## SENATE BILL NO. 169

INTRODUCED BY K. GEBHARDT

A BILL FOR AN ACT ENTITLED: "AN ACT EXCLUDING ELECTED OFFICIALS FROM THE DEFINITION OF EMPLOYEE FOR DRUG TESTING PURPOSES; INCLUDING ELECTED OFFICIALS IN THE DEFINITION OF EMPLOYER; MAKING ELECTED OFFICIALS SUBJECT TO THE SAME TESTING REQUIREMENTS AS EMPLOYEES; AMENDING SECTIONS 39-2-206, 39-2-207, 39-2-208, 39-2-209, 39-2-210, AND 39-2-211, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-2-206, MCA, is amended to read:

**"39-2-206. Definitions.** As used in 39-2-205 through 39-2-211, the following definitions apply:

(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.

(3) "Controlled substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug used pursuant to a valid prescription or as authorized by law.

(4) "Employee" means an individual engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary position for an employer and does not include an independent contractor. ~~The term includes an elected official.~~

(5) "Employer" means a person or entity that has one or more employees and that is located in or doing business in Montana. The term includes an elected official.

(6) "Hazardous work environment" includes but is not limited to positions:

(a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;

(b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or

(c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar

1 substances.

2 (7) "Medical review officer" means a licensed physician trained in the field of substance abuse.

3 (8) (a) "Prospective employee" means an individual who has made a written or oral application to an  
4 employer to become an employee.

5 (b) The term does not include a candidate for an elected office.

6 (9) "Qualified testing program" means a program to test for the presence of controlled substances and  
7 alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

8 (10) "Sample" means a urine specimen, a breath test, or oral fluid obtained in a minimally invasive  
9 manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance  
10 of drug testing that is used to determine the presence of a controlled substance or alcohol."  
11

12 **Section 2.** Section 39-2-207, MCA, is amended to read:

13 **"39-2-207. Qualified testing program.** A qualified testing program must comply with the following  
14 criteria:

15 (1) Testing must be conducted according to the terms of written policies and procedures that must be  
16 adopted by the employer and must be available for review by all employees and elected officials 60 days before  
17 the terms are implemented or changed. Controlled substance and alcohol testing procedures for samples that  
18 are covered by 49 CFR, part 40, must conform to 49 CFR, part 40. For samples that are not covered by 49 CFR,  
19 part 40, the qualified testing program must contain chain-of-custody and other procedural requirements that are  
20 at least as stringent as those contained in 49 CFR, part 40, and the testing methodology must be cleared by the  
21 United States food and drug administration. At a minimum, the policies and procedures must require:

22 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful  
23 manufacture, distribution, possession, or use of a controlled substance;

24 (b) the employer's program for regularly educating or providing information to employees and elected  
25 officials on the health and workplace safety risks associated with the use of controlled substances and alcohol;

26 (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by  
27 employees and elected officials;

28 (d) a description of available employee assistance programs, including drug and alcohol counseling,  
29 treatment, or rehabilitation programs that are available to employees and elected officials;

30 (e) a description of the sanctions that the employer may impose on an employee or elected official if the

1 employee or elected official is found to have violated the standards of conduct referred to in subsection (1)(c) or  
2 if the employee or elected official is found to test positive for the presence of a controlled substance or alcohol;

3 (f) identification of the types of controlled substance and alcohol tests to be used from the types of tests  
4 listed in 39-2-208;

5 (g) a list of controlled substances for which the employer intends to test and a stated alcohol  
6 concentration level above which a tested employee or elected official must be sanctioned;

7 (h) a description of the employer's hiring policy with respect to prospective employees who test positive;

8 (i) a detailed description of the procedures that will be followed to conduct the testing program, including  
9 the resolution of a dispute concerning test results;

10 (j) a provision that all information, interviews, reports, statements, memoranda, and test results are  
11 confidential communications that may not be disclosed to anyone except:

12 (i) the tested employee or elected official;

13 (ii) the designated representative of the employer; or

14 (iii) in connection with any legal or administrative claim arising out of the employer's implementation of  
15 39-2-205 through 39-2-211 or in response to inquiries relating to a workplace accident involving death, physical  
16 injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee or  
17 elected official may have caused or contributed to the accident; and

18 (k) a provision that information obtained through testing that is unrelated to the use of a controlled  
19 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released  
20 to the employer.

21 (2) In addition to imposing appropriate sanctions on an employee or elected official for violation of the  
22 employer's standards of conduct, an employer may require an employee or an elected official who tests positive  
23 on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling,  
24 treatment, or rehabilitation program as a condition of continued employment. An employer may require the  
25 employee or elected official to submit to periodic followup testing as a condition of the counseling, treatment, or  
26 rehabilitation program.

27 (3) Testing must be at the employer's expense, and all employees must be compensated at the  
28 employee's regular rate, including benefits, for time attributable to the testing program.

29 (4) The collection, transport, and confirmation testing of urine samples must be performed in accordance  
30 with 49 CFR, part 40, and the collection, transport, and confirmation testing of nonurine samples must be as

1 stringent as the requirements of 49 CFR, part 40, in requiring split specimens as defined by the United States  
2 department of health and human services, requiring transport to a testing facility under the chain of custody, and  
3 requiring confirmation of all screened positive results using mass-spectrometry technology.

4 (5) Before an employer may take any action based on a positive test result, the employer shall have the  
5 results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An  
6 employee, ~~or prospective employee,~~ or elected official must be given the opportunity to provide notification to the  
7 medical review officer of any medical information that is relevant to interpreting test results, including information  
8 concerning currently or recently used prescription or nonprescription drugs.

9 (6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be  
10 conducted using testing equipment that appears on the list of conforming products published in the Federal  
11 Register.

12 (7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person  
13 to be considered as having alcohol in the person's body."  
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15 **Section 3.** Section 39-2-208, MCA, is amended to read:

16 **"39-2-208. Qualified testing program -- allowable types -- procedures.** Each of the following activities  
17 is permissible in the implementation of a qualified testing program:

18 (1) An employer may test any prospective employee as a condition of hire.

19 (2) An employer may use random testing if the employer's controlled substance and alcohol policy  
20 includes one or both of the following procedures:

21 (a) An employer or an employer's representative may establish a date when all salaried and  
22 wage-earning employees and elected officials will be required to undergo controlled substance or alcohol tests,  
23 or both.

24 (b) An employer may manage or contract with a third party to establish and administer a random testing  
25 process that must include:

26 (i) an established calendar period for testing;

27 (ii) an established testing rate within the calendar period;

28 (iii) a random selection process that will determine who will be tested on any given date during the  
29 calendar period for testing;

30 (iv) all supervisory and managerial employees and elected officials in the random selection and testing

1 process; and

2 (v) a procedure that requires the employer to obtain a signed statement from each employee and elected  
3 official that confirms that the employee or elected official has received a written description of the random  
4 selection process and that requires the employer to maintain the statement in the employee's or elected official's  
5 personnel file. The selection of employees and elected officials in a random testing procedure must be made by  
6 a scientifically valid method, such as a random number table or a computer-based random number generator  
7 table.

8 (3) An employer may require an employee or elected official to submit to followup tests if the employee  
9 or elected official has had a verified positive test for a controlled substance or for alcohol. The followup tests must  
10 be described in the employer's controlled substance and alcohol policy and may be conducted for up to 1 year  
11 from the time that the employer first requires a followup test.

12 (4) An employer may require an employee or an elected official to be tested for controlled substances  
13 or alcohol if the employer has reason to suspect that an employee's or elected official's faculties are impaired on  
14 the job as a result of the use of a controlled substance or alcohol consumption. An employer shall comply with  
15 the supervisory training requirement in 49 CFR, part 382.603, whenever the employer requires a test on the basis  
16 of reasonable suspicion.

17 (5) An employer may require an employee or an elected official to be tested for controlled substances  
18 or alcohol if the employer has reason to believe that the employee's or elected official's act or failure to act is a  
19 direct or proximate cause of a work-related accident that has caused death or personal injury or property damage  
20 in excess of \$1,500."

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22 **Section 4.** Section 39-2-209, MCA, is amended to read:

23 **"39-2-209. ~~Employee's right~~ Right of rebuttal.** The employer shall provide an employee or an elected  
24 official who has been tested under any qualified testing program described in 39-2-208 with a copy of the test  
25 report. The employer is also required to obtain, at the employee's or elected official's request, an additional test  
26 of the split sample by an independent laboratory selected by the person tested. The employer shall pay for the  
27 additional tests if the additional test results are negative, and the employee or elected official shall pay for the  
28 additional tests if the additional test results are positive. The employee or elected official must be provided the  
29 opportunity to rebut or explain the results of any test."

**Section 5.** Section 39-2-210, MCA, is amended to read:

**"39-2-210. Limitation on adverse action.** No adverse action, including followup testing, may be taken by the employer if the employee or elected official presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee or elected official presents a reasonable explanation or medical opinion, the test results must be removed from the employee's or elected official's record and destroyed."

**Section 6.** Section 39-2-211, MCA, is amended to read:

**"39-2-211. Confidentiality of results.** (1) Except as provided in subsection (2) and except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding.

(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

(a) legal action arising out of an employer's implementation of 39-2-205 through 39-2-211; or

(b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500 when there is reason to believe that the tested employee or elected official may have caused or contributed to the accident."

**NEW SECTION. Section 7. Effective date.** [This act] is effective on passage and approval.

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